UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JEAN PEOPLES, PATRICIA ROUNTREE, MARGARET BROWN, AND AUDREY MYERS, Appellants, v. DEPARTMENT OF THE NAVY Agency.	DOCKET NUMBERS DC-0752-98-0361-I-1 DC-0752-98-0364-I-1 DC-0752-98-0362-I-1 DC-0752-98-0363-I-1 DATE: August 6, 1999

Neil C. Bonney, Esquire, Neil C. Bonney & Associates, Virginia Beach, Virginia, for the appellants.

Cynthia L. Taylor, Norfolk, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a separate dissenting opinion.

OPINION AND ORDER

¶1 The appellants petition for review of the initial decision, issued on May 7, 1998, that dismissed their appeals for lack of Board jurisdiction. We DENY the petitions for review for failure to meet our criteria for review under 5 C.F.R. § 1201.115. We REOPEN the appeal on our own motion, 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the cases to the regional office for a jurisdictional hearing.

BACKGROUND

¶2 On February 25, 1998, the appellants sought the assistance of the agency Employee Assistance Program counselor with regard to the alleged continuing bizarre behavior of

their coworker, James Bailey. Initial Appeal File (IAF), Tabs 5 and 6. The appellants alleged that he "yelled and screamed" at one of them, and wrote letters suggesting that they were "working with the devil." IAF, Tab 6. The appellants stated that they feared that Bailey considered himself an "avenging angel" who would carry out judgment on them. *Id*. The counselor advised them not to return to their work stations. They did not return to their work stations, and at least three appellants apparently have remained away from work since that time. IAF, Tabs 5 and 6. She referred three, Jean Peoples, Patricia Rountree, and Margaret Brown, for psychiatric treatment. *Id*. She recommended continuing counseling for Audrey Myers. *Id*. On March 3, 1998, the appellants petitioned for appeal, alleging that they were forced to leave their work stations by intolerable working conditions, and that thus the agency constructively suspended them. IAF, Tabs 1 and 6. They also contended that the agency's alleged action was because of discrimination on the basis of sex. *Id*.

¶3 The administrative judge found that the Board's case law finding that intolerable working conditions may render a resignation or retirement involuntary was inapplicable to the situation of alleged enforced leave. IAF, Tab 9 (Initial Decision (ID) at 3). She found that the Board lacked jurisdiction over the appeals and the affirmative defenses, and dismissed the appeals. *Id*. (ID at 4). The appellants have petitioned for review. Petition for Review File, Tab 1. The agency did not respond to the petition for review.

ANALYSIS

¶4 The Board's jurisdiction is not plenary but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. The appellant bears the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See Herring v. Department of Veterans Affairs*, 72 M.S.P.R. 96, 98 (1996). An agency's placement of an employee on enforced leave for more than 14 days constitutes a constructive suspension appealable to the Board. *See Lohf v. U.S. Postal Service*, 71 M.S.P.R. 81, 84 (1996). The test for determining whether an employee's absence constitutes a constructive suspension is whether the employee's absence from the agency was voluntary or involuntary. *See Freeman v. U.S. Postal Service*, 78 M.S.P.R. 665, 667-68 (1998); *Holloway v. United States Postal Service*, 993 F.2d 219, 220-21 (Fed. Cir. 1993); *Perez v. Merit Systems Protection Board*, 931 F.2d 853, 855 (Fed. Cir. 1991).

¶5 The Board has consistently held that intolerable working conditions may render a resignation or a retirement involuntary, and thus appealable to the Board as a removal. Intolerable working conditions may render an action involuntary when, under all the circumstances, the working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to leave the workplace. *See Markon v. Department of State*, 71 M.S.P.R. 574, 577 (1996); *Heining v. General Services Administration*, 68 M.S.P.R. 513, 520 (1995).

¶6 The touchstone of the analysis, and the common element in all of our cases involving involuntary personnel actions “is that factors have operated on the employee’s decision-

making processes that deprived him or her of freedom of choice... ." *Heining*, 68 M.S.P.R. at 519. The Board evaluates the voluntariness of a particular personnel action "based on whether the totality of the circumstances supported the conclusion that the employee was effectively deprived of free choice in the matter... ." *Id*. at 519-20. The totality of the circumstances are examined by an objective standard, not the employee's purely subjective evaluation. *Id*. at 520. Under that objective standard, "the Board will find the resignation involuntary only if the employee demonstrates that the ... agency engaged in a course of action that made working conditions so difficult or unpleasant that a reasonable person would have felt compelled to resign." *Id*. at 522.

¶7 The Board has previously recognized, in cases involving an absence from work based upon the employee's medical condition, that allegations of intolerable working conditions may establish an involuntary or constructive suspension,. *See Thibodeaux v. Department of the Air Force*, 76 M.S.P.R. 178, 181 (1997); *Dize v. Department of the Army*, 73 M.S.P.R. 635, 639-40 (1997); *Baker v. U.S. Postal Service*, 71 M.S.P.R. 680, 692 (1996). We find these cases apt, and by analogy recognize that proof of intolerable working conditions compelling an employee to be absent may also support a finding of constructive suspension in certain circumstances.

¶8 We also find reasonable a requirement that the employee alleging that her absence is caused by such conditions must inform the agency of the existence of the objectionable conditions, and must request assistance or remediation from the agency. No employee is entitled to leave work and remain absent without explanation. *Cf. Freedman v. Veterans Administration*, 23 M.S.P.R. 361, 363-64 (1984) (appellant removed for abandonment of position had informed agency of alleged death threats causing him to leave work and not return; allegation sufficient to warrant jurisdictional hearing to rebut presumption of voluntary abandonment of position and show that absence was the result of a constructive removal).

¶9 Similarly, the agency obviously must be put on notice of the specific nature of the conditions and the employee's inability to cope with them before it can be expected to investigate, attempt remediation of the conditions if necessary, or to consider finding other duties or positions for the employee pending resolution of the complaints. *Cf. Thibodeaux*, 76 M.S.P.R. at 181; *Dize*, 73 M.S.P.R. at 639-40 (employee required to inform agency of medical condition and seek assistance from the agency). The agency's knowledge of the intolerable working conditions, whether actual or constructive, must be shown in order to establish a culpable connection between the objectionable conditions and the agency's duty, if any, to alleviate the conditions. *See Heining*, 68 M.S.P.R. at 522 (employee must show that agency is responsible for conditions compelling the involuntary personnel action).

¶10 The administrative judge found that the constructive retirement or resignation cases were inapposite because the appellants in such cases were no longer government employees. IAF, Tab 8 at 3. This is a distinction without a difference. The focus of our inquiry is not on the employee's current status, but on whether an appealable constructive

personnel action resulted from coercion or duress imputable to the agency. We find that intolerable working conditions may render an absence from the workplace of more than 14 days involuntary, and thus appealable to the Board as a constructive suspension. To hold otherwise would force an employee faced with intolerable working conditions either to resign, retire, or endure.

¶11 The appellants' specific allegations of intolerable working conditions constitute nonfrivolous allegations of involuntary absences from duty. Each appellant contends that her absence was forced upon her because, for several years, Bailey's actions caused her such stress that she was unable to report for duty. IAF, Tab 6. Specifically, each appellant asserts that the employer-retained counseling service diagnosed that she would suffer emotional injury or harm if she returned to work alongside Bailey. *Id*. Additionally, each of the appellants, except Audrey Myers, subsequently was advised by her individual psychiatrist that her symptoms would worsen and she would suffer injury or harm emotionally if she returned to work. *Id*. Further, the appellants informed the agency that they would return to work if their medical conditions allowed and the intolerable working conditions were remedied. IAF, Tab 5, Subtabs 4 and 4a.

¶12 The appellants further alleged that their supervisor abnegated his responsibility to check or address the situation allegedly caused by Bailey, leaving them without assistance in the health-threatening situation. *See* IAF, Tab 6. Resolution of that allegation goes to the merits of the appeals, and must await determination following a finding of jurisdiction on remand.

¶13 Thus, we find that the appellants have made nonfrivolous allegations of Board jurisdiction. Accordingly, we vacate the initial decision and remand this case to the administrative judge for a jurisdictional hearing. At this hearing, each appellant will have the burden to establish Board jurisdiction under her particular circumstances. For each appellant who establishes that the Board has jurisdiction over her appeal, the administrative judge shall apprise her of her burden of proof on her affirmative defense of sex discrimination, afford her the opportunity to develop this affirmative defense, and adjudicate it.*[*]

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

[*] In rejecting the appellants' claim, the administrative judge analogized their contemporaneous absences from work to a strike situation where employees

voluntarily absent themselves from work in reaction to working conditions. IAF, Tab 9 (ID at 3). Any suggestion in the initial decision that the appellants have engaged in an illegal strike is premature, and a matter to be adjudicated on the evidence of record as it is further developed.

DISSENTING OPINION OF VICE CHAIR BETH S. SLAVET

in

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I respectfully dissent from the majority's opinion. The Board has limited jurisdictional authority, and may adjudicate appeals only for which a right of appeal is specifically granted by law, rule, or regulation. 5 U.S.C. § 7701(a). *See Cowen v. U.S.*, 710 F.2d 803, 805 (Fed Cir. 1983). Although the majority is correct in noting that the Board has held that intolerable working conditions may render a resignation or retirement involuntary, and thus appealable to the Board as a removal, it does not follow that an employee may temporarily absent himself from work because of perceived working conditions, and then successfully claim that the Board has jurisdiction over his absence as a constructive suspension.

Intolerable working conditions may render an employee's otherwise voluntary resignation or a retirement involuntary and within the Board's jurisdiction, when, under the "totality of circumstances," the employee's working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to resign or retire, thus severing his relationship with the agency. *See* cases cited in Majority Opinion at ¶ 5. Although the Board has previously recognized that resignations and retirements may be considered involuntary under a "totality of circumstances" test, the Board has never applied the "totality of circumstances test" to find a constructive suspension where an employee determines independently that particular circumstances in the workplace constitute intolerable work conditions. Instead, in order to find Board jurisdiction over an alleged constructive suspension, the Board has required an agency action, such as a refusal to permit an employee to

return to duty. *See, e.g, Baker v. U.S. Postal Service,* 71 M.S.P.R. 680, 693-94 (1996); *Perez v. Merit Systems Protection Board,* 931 F. 2d 853, 855 (Fed. Cir. 1991) (no constructive suspension where appellant initiated absence and it was the appellant, not the agency, who controlled the choice to remain absent). *Accord, Bucci v. Department of Education,* 36 M.S.P.R. 489 (1988). *See also Moon v. Department of the Army,* 63 M.S.P.R. 412, 419-20 (1994) (appellant's failure to return to duty, although medically justifiable, not at behest or in control of the agency). Without any such agency action in this case, the majority opinion extends the Board's jurisdiction to voluntary absences from work based on an appellant's disagreement, however justified, with the agency's workforce management choices.

Moreover, although the majority states that an employee should not be forced to choose between enduring alleged intolerable work conditions, and either resignation or retirement, the appellants have not demonstrated, or even alleged, that there were no other courses available to them. *See Hijar v. Department of the Army, 6* M.S.P.R. 133, 136 (1981) (presumption of voluntary resignation not rebutted where the appellant could have elected to have been placed in an AWOL status and then challenged any disciplinary action based thereon). Nothing in the record would support a finding that these appellants in fact had no alternative to absenting themselves from work, such as filing a grievance over their working conditions, or filing actions under other statutory or agency remedial procedures. *See Pierce v. Department of the Air Force,* 19 M.S.P.R. 548, 551 (1984) (appellant must show, inter alia, that circumstances permitted no other choice of action). *Cf. Heining v. General Services Administration,* 68 M.S.P.R. 513, 523 (1995) (involuntary resignation found where the appellant not only offered an overwhelming amount of evidence supporting intolerable working environment, but did not resign until she pursued many grievances and two complaints, receiving an adverse decision on her grievances just prior to her resignation).

For the reasons set forth above, I would find that the appellants have failed to raise a nonfrivolous allegation of jurisdiction and I would dismiss the appeals.

AUGUST 6, 1998

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Beth S. Slavet, Vice Chair